IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 280

Office Supreme Court, U.S.
FILED
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CITY OF DETROIT, a municipal corporation, BOARD OF ASSESSORS OF THE CITY OF DETROIT,
Petitioners-Plaintiffs,
MICHIGAN STATE TAX COMMISSION,
Appellant,
v.
AMBASSADOR STEEL COMPANY,
a Michigan corporation,
ADVANCE STEEL COMPANY,
a Michigan corporation,
AMERICAN STEEL CORPORATION,
a Michigan corporation,
BARSTEEL CORPORATION,
a Michigan corporation,
CONTRACTORS STEEL COMPANY,
a Michigan corporation,
CRAFT STEEL & SUPPLY COMPANY, INC.,
a Michigan corporation,
EWALD STEEL COMPANY,
a Michigan corporation,
KASLE STEEL CORPORATION,
a Michigan corporation,
KENWAL PRODUCTS CORPORATION,
a Michigan corporation,
PARAGON STEEL CORPORATION,
a Michigan corporation,
TITAN STEEL COMPANY,
a Michigan corporation,
Respondents.

BRIEF OF RESPONDENT, AMERICAN STEEL CORPORATION, IN OPPOSITION TO GRANTING OF THE PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS, DIVISION 1 AND APPENDIX

(For List of Attorneys See Inside Front Cover)

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OPINIONS BELOW

In addition to the opinions referred to in the petition, the decision of the Michigan State Tax Commission, applicable to this Respondent, dated February 3, 1967, is attached as Appendix A.

JURISDICTION

(1) Involved here is Petitioners' Petition for Writ of Certiorari to review the decision of the Michigan Court of Appeals which vacated certain assessments on imported steel placed on Detroit's 1966 personal property rolls as to taxpayers (Respondents) by the Michigan State Tax Commission. The Tax Commission action was based on petition of Detroit's Board of Assessors following adverse decision by the City's Common Council. Taxpayers claimed and the Michigan Court of Appeals held that the steel in question was immune from taxation by virtue of Article I, Sec. 10, Cl. 2 of the Constitution of the United States.

A timely application for leave to appeal filed with the Michigan Supreme Court by Petitioners was denied on March 20, 1969.

(2) Jurisdiction of this Court to deny writ of certiorari is invoked under C. 646, 62 Stat. 929 (28 U.S.C.A. 1257 (3)). This brief applies to Respondent, American Steel Corporation.

QUESTIONS PRESENTED FOR REVIEW

Respondent contends that Petitioners have failed to show sufficient grounds for the granting, by this Court, of a Writ of Certiorari, but if this Court does grant such writ, Respondent contends that the questions as phrased by Petitioners do not accurately reflect the issues before this Court and that the following should be the issues considered:

1. Did steel, made to order and specifications of Respondent by direct negotiation and agreement between Respondent and the producing company and shipped directly from the foreign producer to Detroit, in pursuance of that negotiation and agreement, retain its status as an import at the time Petitioner sought to tax it?

The Michigan Court of Appeals said "Yes."
Respondent contends the answer should be "Yes."

2. Could steel, efficiently caused to be imported by Respondent, lose its import status with resultant local tax immunity by virtue of actions consistent with the importation taking place prior to the physical act of bringing the steel into the country, and in many cases, even before the steel was produced?

The Michigan Court of Appeals said "No."
Respondent contends the answer should be "No."

CONSTITUTIONAL PROVISION INVOLVED

The pertinent constitutional and statutory provisions are set forth in the Petition.

STATEMENT

This litigation, as to this Respondent, arises from the petition of the Board of Assessors of the City of Detroit of June 29, 1966, to the State Tax Commission of Michigan to review the action of the Common Council of the City of Detroit, sitting as a Board of Review, in denying the Board of Assessors' appeal for revision of the tax assessment on American Steel Corporation, such revision sought to include the value of imported steel. American Steel Corporation had claimed immunity from local *ad valorem* taxation for certain steel imported from abroad, as to the tax year here in question from Japan and Belgium.

The State Tax Commission on February 3, 1967, reversed the decision of the Common Council of the City of Detroit, sitting as a Board of Review, and increased the assessment of Respondent American Steel for the 1966 tax year by $262,310 from $330,160 to $592,470.

It did so despite uncontroverted evidence indicating Respondent to be the efficient cause of importation of the steel in question. For a variety of other reasons not here presented for review, particularly the failure of the Tax Commission to make findings of fact, its decision, as Respondent contended in its brief to the Michigan Court of Appeals, did not conform to provisions of Michigan law.

Respondent in turn sought and obtained leave to appeal from the Michigan Court of Appeals and the Respondent's case was consolidated with various others involving a

similar question on imports, and the Michigan Court of Appeals, Division I, consisting of J. G. Kavanagh, P.J., Burns and Fitzgerald, J.J. issued an opinion on December 2, 1968 (165 N.W.2d 875) reversing the several determinations of the State Tax Commission and thus, in effect, affirming the original determination of the Common Council of the City of Detroit, and finding that the steel was entitled to immunity. The Court further found that at the time of assessment the steel was in its original package and was not being put to any purpose for which it was imported.

The Petitioners then sought leave to appeal the Court of Appeals decision to the Michigan Supreme Court. Leave was denied by the Michigan Supreme Court in an order issued March 20, 1969, on the ground that Petitioners failed to:

> "Persuade the Court that they have a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous."

Subsequently, on May 21, 1969, the Michigan Supreme Court denied a Motion of Stay Enforcement of its decision pending this Writ of Certiorari.

Petitioners are now seeking a Writ of Certiorari from this Court.

ARGUMENT

Respondent first notes that Petitioners have failed to meet the requirements of the Supreme Court's rules governing granting of certiorari. Petitioners, as will be shown below, have not met the various criteria set forth under rule 19 and applicable interpretative decisions. As this Court said in *Rice v. Sioux City Cemetery*, 349 U.S. 71, 74

(1955) the Supreme Court does not "sit for the benefit of particular litigants" and, further, review is most likely to be granted where a lower decision was on a substantial question not previously determined by this court or where the decision was probably not in accord with applicable precedent. Petitioners have failed to bring themselves within these, or other, criteria of the rule.

Petitioners here seek Supreme Court determination that steel, made to Respondent's order and specifications, by direct negotiation and agreement effected between Respondent and the producing companies, shipped directly from the foreign producer to Respondent in Detroit, did not retain its status as an import at the time Petitioners sought to tax it. Respondent here deals primarily with the Japanese steel it imported, since, as to other steel imported by Respondent, or otherwise sought to be taxed against Respondent, for the tax year here in question, there are additional factors which would establish immunity under questions which have not been raised before this Court.

Petitioners claim that the steel lost its status not because of actions after it was brought into the country but rather because of actions taking place before it was brought into the country, in fact, in most instances, before the steel was even produced. These actions consisted of the execution of certain documents by the producer and the American wholly owned subsidiary of a foreign trading house, (in this Japanese situation—Tokyo Boeki, U.S.A. (meaning Tokyo Traders)), due to the fact that the business customs of the foreign country prevented a direct arrangement between the producer and Respondent. In effect, Respondent, American Steel, purchased from and through the subsidiary domestic company the right to import the foreign produced steel into the United States. Without doubt, however, Toyko Boeki, was, in substance,

not a principal, it was indeed, only an instrumentality used by the Japanese producer to effectuate the importation agreed upon between that producer and Respondent.

Petitioners are, in effect, asking this Court to find either that this instant case does not come within its decision in *Hooven and Allison Co. v. Evatt,* 324 U.S. 652 (1945), on the basis of narrow factual distinctions, found by the Michigan Court of Appeals not to be material, or that *Hooven* should be set aside as precedent by this Court, all upon an argument that at best is an exaggeration of form over reality and substance.

The Michigan Court of Appeals found the *Hooven* decision applicable to the facts here, and found substantial similarities between the two cases:

> "In both instances the taxpayers placed orders with domestic corporate intermediaries for merchandise which originated in a foreign country. The price included charges for ocean freight, insurance, and customs. The goods were specifically marked when they left the foreign port to identify the product for the taxpayer, except in a few instances when the sales took place while the steel was enroute. . . ."

The court does note also:

> "In the present cases the appellants contracted with companies which extended their own credit and received all payments for their own accounts. The precise relationship between the domestic companies and the foreign mills (or brokers in some cases) does not clearly appear on the records, but it can be discerned that the domestic concerns entered into separate and distinct contracts with the foreign sellers."

The Court then goes on to note, in conformity with *Hooven:*

> "In determining who is the 'efficient cause' of importation in the constitutional sense, we must look beyond matters of form to the substance of the transaction. Perhaps the most significant matter which the Supreme Court emphasized in *Hooven, supra*, p. 661, was the fact that performance of the contract called for, and necessarily resulted in, importation of the merchandise. Appellants' contracts with the domestic intermediaries specified that the steel was to be shipped from a foreign country or was already en route directly to the appellants. Performance of these contracts then, as in *Hooven*, called for, and necessarily resulted in, importation."

This Court in *Hooven* indicated its understanding of the variety of formal methods of effectuating importation (324 U.S. at 662):

> "It is common knowledge to lawyers and businessmen that vast quantities of merchandise are annually imported into this country by purchasers resident here, for sale or manufacture here. Sometimes the buyer completes the purchase abroad, in person; and ships to this country, sometimes, as in this case, the purchase is on unsecured credit, but more often it is under contracts by which the vendor reserves in himself or his agent or a banker a lien of title as security for payment of the purchase-price on or after arrival."

The Michigan Court of Appeals opinion was clearly within the guidelines of *Hooven*, where this Court said:

> "We are concerned with matters of *substance* not of form. When the merchandise is brought from another country to this, *the extent of its immunity from state taxation turns on the essential nature of*

the transaction, considered in the light of the constitutional purpose, and *not on the formalities with which the importation is conducted or on the technical procedures by which it is effected.*" (Emphasis ours).

The Michigan Court of Appeals ruled that the essential nature of the transaction involved here was such that the steel retained its status as an import at the time of the taxation by Petitioner. This Court should let that decision stand, as did the Michigan Supreme Court.

The decision of the Michigan Court of Appeals was clearly supported by the evidence produced by Respondent at the Tax Commission hearing on November 30, 1966. The uncontradicted testimony of Mr. Fred Ginsberg, President of American Steel, established that he went to Japan because he desired to accomplish purchase and importation of certain steel and there held direct talks on behalf of Respondent with representatives of Fuji Iron and Steel Company, the producer (Tax Commission Hearing transcript p. 25). At such meeting discussions were held indicating interest on Respondent's part, discussing specifications and technical matters, and, in effect, verbally and substantially agreeing on the contract. Uncontroverted evidence was further produced by Respondent to establish that it could not actually contract with the Japanese producing firm which could not in form deal with Respondent because of Japanese custom (Hearing transcript p. 26). Thus Respondent had to place the formal order through Tokyo Boeki (U.S.A.) Inc., a wholly-owned subsidiary of Tokyo Boeki, Ltd., a Japanese trading house, which was used for this purpose (Hearing transcript p. 28).

Respondent believes that the importation of goods from abroad, like the concept of interstate and foreign com-

merce, is a practical conception, drawn from the realities of trade, and not, as Mr. Justice Holmes observed in *Rearick v. Pennsylvania*, 203 U.S. 507, 512 (1906) dependent upon the "witty diversities (Yelv. 33) of the law of sales." Nothing in *Hooven* suggests that the fact of importation hinges upon whether a selling agent obtains a commission on the transaction or whether shipping documents are in one form or another. The formalities do not affect the fact that Respondent negotiated for the steel directly in Japan with the manufacturer and received the steel directly from Japan.

Petitioner, as a further objection to the decision below, states (petition p. 9):

> "Extension of immunity to respondents results in characterizing as importers both respondents and the domestic companies with whom they contracted."

This argument ignores the mandate of the United States Constitution which is: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on *Imports* . . ." (Emphasis ours). The question primarily to be decided is—Is the status of the steel such that it retains its character as an import? The question of who is the importer is subsidiary to that. In other words, at the time of claimed tax liability here, after the steel was shipped from the foreign country, had anything caused the steel to loose its import tax immunity status? Respondent contends the only plausible answer is no. It further submits that in substance it was the importer, with the domestic subsidiary, Tokyo Boeki, serving as an instrumentality of that importation.

Any contrary contention must be based upon a premise that steel, brought into the United States, lost its status as an import before it was ever brought into the United

States, in fact, in most cases, before it was ever manufactured in the foreign country. Under applicable law, the steel was an import, entitled to immunity at the time Petitioners sought to tax it.

In further straining to distinguish the facts of the instant case from those in *Hooven,* Petitioners point to the acknowledged fact that Respondent intended to resell the steel rather than use it for a manufacturing process of its own. The very meaning of *Brown v. Maryland* (1827), 12 Wheat. 419 belies this attempted distinction. The whole thrust of *Brown* is that a state may not require the importer of foreign articles to take out a license from the State before being permitted to *sell* the import (Emphasis ours). Certainly the fact that Respondent was to sell the steel instead of using it in manufacturing can not remove this case from the *Hooven* doctrine and the concept of import immunity. In accord with *Brown* is the recent decision in *Wheeling Steel Corp. v. Porterfield,* 14 Ohio St. 2d 85, 236 N.E. 2d 652 (1968).

Even more incredulous is Petitioner's effort to upset a constitutional immunity on the basis that Respondent's American customers could also claim an importation immunity. This Respondent caused the importation, not its customers, and the rationale of the decisions of the Court of Appeals and *Hooven* on their face obviate any such fearful consequence.

Petitioners also urge a restatement of the Import-Export immunity doctrine, one of the longest standing Constitutional provisions, because (petition p. 10):

> "To equate 'the efficient cause of importation' with the 'importer' under these circumstances will permit much foreign goods, even though domesticated, to be placed beyond the taxing jurisdiction of the states and their local taxing units."

Since there is nothing in the law as now understood or in its application to the present facts, to support this contention, Petitioners are really stating that the constitutional immunity is not desirable from their revenue producing point of view. This is an irrelevant argument in this tribunal. As the Michigan Court of Appeals in this case correctly stated (citing in support *Youngstown Sheet & Tube Company v. Bowers* (1959), 358 U.S. 534):

> "Subsequent to *Brown v. Maryland, supra*, it has become well established that imports lose their constitutional immunity when the importer (1) sells them or (2) 'breaks up the packages' or (3) puts them to the use for which they were imported."

Other recent cases have stressed these immunity limitations, including *Department of Revenue v. Beam Distilling Co.*, 377 U.S. 341 (1964) and *Wheeling Steel Corp. v. Porterfield, supra*. It is clear that when the steel is sold by Respondent, or otherwise is used in a manner that causes it to lose its immunity, its immunity will, in fact, end. Until then, the constitution affords the immunity and absent its change, Petitioners' arguments, however pragmatic, are without judicial cognizance.

Petitioners appear to argue that under the present law field auditors will be unable to determine who should be granted immunity. This, at best, is so specious an argument to support destruction of a constitutional immunity that we deem detailed response unnecessary. We hardly think that a constitutional immunity to taxation should be endangered because a taxing authority asserts it lacks trained personnel to evaluate that immunity. Assuredly that is not the criterion for immunity. Of course, the reality is that the particular facts, giving rise to the immunity found below, were quite readily apparent, in the administrative process, and required no more sophistica-

tion than we must assume would always be available to the administrators of *ad valorem* taxation.

CONCLUSION

Petitioners have not shown the Michigan Court of Appeals decision to be erroneous in the light of existing and constitutionally imperative law, applied to the facts presented below. They have shown no inconsistency of lower court decisions nor have they shown any constitutional necessity for reinterpretation of existing constitutional law.

Respondent under the evidence presented below, has established that the steel in question was imported after negotiation and agreement made between Respondent and the foreign producing firm and that it was shipped directly from the foreign producer to Respondent. The steel was produced only for Respondent and to its specifications. Respondent contends, and the adjudicating Court of Appeals below found, that the steel retained its immunity under the *Hooven* decision, because the distinctions claimed by Petitioners in this Court between *Hooven* and the instant case are without substance.

The Supreme Court of the State of Michigan found no fault with that Court of Appeals determination so as to accord its taxing authorities leave to appeal. Petitioners have failed to advance any reason for this Court to question the decision below.

Petitioners having failed to show that they are entitled to a Writ of Certiorari, this Respondent respectfully requests this Court to deny their petition.

Respectfully submitted,

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July 14, 1969

APPENDIX A

STATE OF MICHIGAN

BEFORE THE MICHIGAN STATE TAX COMMISSION

At a meeting of the Michigan State Tax Commission held on the 26th day of January, 1967 at Lansing, Michigan.

In Re Petition No. 15-343 of the Detroit Board of Assessors, City of Detroit, County of Wayne, State of Michigan, received on June 30, 1966, requesting to place upon the assessment roll property omitted therefrom, consisting of personal property in the form of steel inventory, to be assessed to American Steel Corporation, 7020 East McNichols, Detroit, Michigan.

The petitioner, the Detroit Board of Assessors, contends that personal property was erroneously omitted from the assessment rolls and the same should be placed upon the rolls in accordance with the provisions of Sec. 211.152 C. L. of Mich. 1948.

The Commission accepted the petition for examination and caused an investigation to be made to determine the assessable value of the personal property and to determine to whom the property should be assessed. A hearing was held on November 30, 1966 at Detroit, Michigan, at which hearing the taxpayer of the property in question was represented.

After consideration of the data presented at the hearing and the examination and investigation of the Commission's staff along with other written documents and exhibits of the taxpayer and the Detroit Board of Assessors the Commission finds:

1. The Detroit Board of Assessors in Petition No. 15-343 asks the current assessment of $330,160 to be raised to $592,470 because of additional value revealed in an audit by a member of the Board of Assessors staff.

2. The investigation revealed that the issue involved in this dispute is not one of valuation but is a legal issue concerning the assessability of certain imported steel inventories. The city of Detroit claims that the steel in question is in the possession of the taxpayer to be purchased under sales contract agreement and thereby has entered the channels of trade and become subject to ad valorem taxation. The taxpayer on the other hand claims that title never passed to them from the importers and as such the steel in question retains its immunity from ad valorem taxation as an "imported product" under Article I, Section 10, Chapter 2 of the United States Constitution which reads:

> "No State shall, without the consent of the Congress, lay any imports (sic) or duties on Imports or Exports . . ."

3. Taxable property, both real and personal in the city of Detroit are assessed at a significant range of from 41% to 56% of their true cash value, or a properly weighted mathematical average for the local unit of 45.25% which is sustained by an equalization study made by the Commission in 1963, which data has been kept routinely current by the Commission and checked in the field by the Commission's staff.

4. That where property was omitted from the assessment roll erroneously it should be placed upon the assessment roll as provided in Sec. 211.152 C. L. of Mich. 1948.

After these findings of facts and the consideration of all the information contained therein the Commission still has

reservations. On the basis of the documents, exhibits, etc., there are doubts as to whether or not the goods in question are "imports" under Article I, Section 10, Chapter 2 of the United States Constitution. Taxation is the rule and there is a presumption that property is taxable unless it clearly appears that constitutional provisions or statutes grant an immunity from taxation. The burden of proof to establish immunity from ad valorem taxation rests on the taxpayer. The Commission is of the opinion that the taxpayer has failed to prove its claim of immunity from taxation based on the theory of imported goods. Therefore, the petition of the Board of Assessors of the city of Detroit is granted with reservation as to the final assessed valuation. This reservation is based upon the utilization of the correct assessment ratio to apply to true cash value in order to achieve the correct assessed valuation. It is determined in the opinion of the Commission that the undisputed true cash value of the property involved is $1,184,930 and the assessment level is 45.25% of true cash value. Therefore, appellant's assessment should be $536,200. Since the proposed assessment per Petition No. 15-343 is $592,470 it is clearly apparent that the proposed assessment is significantly above and is not in accordance to the true cash value reduced to the local assessment level and the true cash value of all other real and personal property within the city of Detroit, reduced to such assessment level. The Commission fully appreciates the fact that the question presented in the petition is of a legal nature. We readily acknowledge that the courts are best adapted to resolving the legal questions involved just as the Commission believes itself to be the most proficient in questions of valuation. Should the taxpayer be dissatisfied and seek further relief available under the law, the Commission directs his attention to Sec. 211.53 of the C. L. of Mich. 1948, or in an action for a declaration of rights.

WHEREFORE, it is hereby ordered that the amount of $536,200 be placed upon the assessment roll as the true and lawful value of such property.

Robert L. Purnell, Chairman

R. Gerald Barr, Commissioner

Ward G. Dexel, Commissioner

February 3, 1967